IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE J.B.KOSHY
&
THE HONOURABLE MRS. JUSTICE K.HEMA

WEDNESDAY, THE 7TH NOVEMBER 2007 / 16TH KARTHIKA 1929

CRL.A.No. 1350 of 2004()

SC.464/2002 of II ADDL.SESSIONS COURT, ERNAKULAM
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APPELLANT: ACCUSED NO.4:

SHABU, S/O. SUKUMARAN,
NJANGADIPARAMBU VEEDU, CHALAPPURAM DESOM,
UNNIMUKKU BHAGOM, KOTTUPADOM ROAD,
NEAR KUTTIKULANGARA AYYAPPA TEMPLE,
KAKKODI VILLAGE.

BY ADV. SRI.P.VIJAYA BHANU
SRI.P.M.RAFIQ

RESPONDENT: COMPLAINANT:

STATE OF KERALA THROUGH THE
ASSISTANT COMMISSIONER OF POLICE, CRIME DETACHMENT,
KOCHI CITY, REPRESENTED BY THE PUBLIC PROSECUTOR,
HIGH COURT OF KERALA, ERNAKULAM.

BY PUBLIC PROSECUTOR SRI.K.C.SANTHOSHKUMAR

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 07/11/2007 ALONG WITH CRA NO. 1130 OF 2006, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

KSS

J.B.KOSHY & K.HEMA, JJ.

CRL.A.NOS.1350 OF 2004
&
1130 OF 2006

Dated this the 7th day of November, 2007

J U D G M E N T

KOSHY,J.

Four persons were charge sheeted for offences punishable under Sections 460, 397 and 302 of the Indian Penal Code. 1st accused absconded. 2nd accused was acquitted by the trial court. He was represented by Legal Aid Counsel (State Brief). The trial court convicted 3rd and 4th accused for the above said offences. Aggrieved by the above conviction and sentence, 3rd accused filed appeal from the jail as Crl.A.No.1130/2006 and 4th accused filed Crl.A.No.1350/2004 and Adv.Sri.Vijayabhanu appeared before us for the appellants in both cases.

2. The prosecution case is summarised by the trial court as follows:

> “Deceased Thankamma Kurian was residing at her house on the side of Thiruvanklam Siva Temple road. On 31.5.2001 at 7 p.m. the accused persons with intention of committing theft jointly trespassed into the house of Thankamma Kurian. The second accused stood as guard and accused 2 and 3 have entered into the hall of the house. Since the deceased noticed the entry of accused 2 and 3, they thought that they will be caught for the offence committed by them, the third accused with intention of murdering her and with the knowledge that their action will cause death of Thankamma Kurian, muffled her mouth from behind and in the meantime the first accused caught hold of Kurian and strangled her by using a 'Kaily'. As a result Thankamma Kurian died and the accused persons have stolen 12 sovereigns of gold ornaments which were kept in a cloth pouch tied at her waist. All the accused persons have acted in consent and they thereby committed the offence under Sections 460, 397 and 302 of the Indian Penal Code.”

3. PW1 gave F.I.statement to the effect that deceased was found lying on her cot at 9.30 p.m. He has not seen the incident. He was residing in a part of the building as a tenant where the incident occurred. On the basis of the above F.I.Statement recorded by PW13 Head constable, crime was registered under the caption 'suspicious death'. PW14 Circle

Inspector of Police, Tripunithura conducted investigation and prepared Ext.P7 inquest report. He filed Ext.P11 report stating that deceased Thankamma was murdered. A1 was arrested in connection with another case on 12.1.2002. On the basis of the information furnished by A1, A3 was arrested on 31.5.2002 and A4 was arrested on 16.5.2002.

4. PW2, son of the deceased deposed that he was living at Thrithala with his family. His father expired in the year 1995 and his mother alone was living at the house situated near Thiruvamkulam Siva Temle. His only sister was married and she is residing with her husband at Pazhanthottam. One room in the house was rented out to PW1. A workshop and a lean situated on the eastern side were leased out to tenants. The neighbouring house belongs to his uncle Thampi. When he came to know of the death, he along with his son reached the place and realised that his mother was murdered. He identified MOs.1 to 17 during his examination. Exts.D1 series contradictions were marked in the evidence. In the police

statement, he stated that he seldom visited his mother. But he deposed before the court that he used to visit his mother almost every week. He also stated that he does not remember whether he had given statement to the police that he does not know the fashion and the weight of the ornaments of his mother before the police. He stated that his mother has no enemies and he never used to interfere with the affairs of his mother. He identified MO8 pouch which was recovered from the body of the mother. Mos.11 to 16 were identified as the ornaments of his mother. MO17 is the gold ingots. He also deposed in the court that his mother had gold ornaments worth 20 sovereigns. But there is no way to identify it. He answered as follows:

He also stated that usually she carry a cloth pouch tied around her waist which cannot be seen from outside. He also stated

that at the inquest he was present and at the time of inquest, ornaments and pouch were recovered from the body.

5. PW3, an auto driver was examined mainly to connect A1 to prove that A1 requested him for help to sell MO14 ring to jewellary owned by PW4. PW4 also corroborated the same. But A1 did not face the trial. Therefore, we are not considering the involvement of A1 in these appeals filed by A3 and A4. Similar statement was given with regard to ingot sold to PW5 by A1. According to the prosecution, A3 gave Ext.P4(a) confession statement on 24.1.2002 and on the basis of the above confession statement, A3 lead PW15 and party to the shop of PW6. PW6 produced a bangle which was sold by A3 and the bangle is identified as MO16. PW6 gave evidence that A3 came to the shop and stated that his wife is in hospital and he wants money to discharge his wife and for that purpose he sold MO16 gold bangle to PW6 and he paid Rs.3,050/- to A3. According to PW6, he was running a jewellary called “Jolly Jewellers”. But he stated that he had no licence to run a

jewellary and he had only licence to sell cool drinks and he also stated that he is not maintaining any registers. According to the defence counsel, no evidence was produced to show that he was conducting a jewellary. The only evidence produced to connect A3 with the offence is the recovery of the gold and there is no other evidence against him. When the recovery evidence alone is the connecting link and in the absence of any other evidence, court should be very cautious in accepting the recovery evidence. Here PW6 was having a cool drinks shop licence and he is running a small shop. It is very difficult to believe that he purchased a gold bangle from A3. He also stated that he never knew A3 before and he also purchased it without any document or any register even though according to him, he is doing jewellary business. It is very difficult to believe PW6 that he remembered at the time of examination that A3 had sold MO16 gold bangles to him. There is also no evidence to show that the MO16 gold bangles belonged to the deceased. According to the deposition of PW2, these gold bangles are not usually worn by the accused but it is usually

kept in the pouch. PW2, who is an occasional visitor to the house stated that he cannot give any identification marks of the gold ornaments of the deceased. Therefore identity of MO16 gold bangles as that of deceased is doubtful. Evidence of PW6 is not enough to evoke confidence, and in any event, the gold bangles recovered were not identified as that of the deceased. As far as A4 is concerned, the only evidence adduced is recovery of gold ring and that was recovered on the basis of the alleged confession made before PW15 and was seized from PW7. PW7 is an auto driver. He deposed before the court that he did not produce the gold ring and nothing was recovered from him. So that recovery was also not proved. He also did not identify A4. He had no previous acquaintance with A4. Therefore the identification or involvement of A4 is also not proved. It is an admitted case that apart form these two recoveries, there is no evidence connecting A3 and A4 with the crime even if the deceased was murdered in the manner in which she was alleged to have been murdered as mentioned by the prosecution.

6. In the absence of direct evidence, circumstantial evidence can be relied on by the prosecution. But as held by the Apex Court in ***Balwinder Singh v. State of Punjab* (AIR 1996 SC 607)** that in a case based on circumstantial evidence the court has to be on its guard to avoid the danger of being swayed by emotional considerations. For convicting the accused generally on the basis of circumstantial evidence, court should be satisfied that all the links in the chain are complete and the only hypothesis possible on the basis of the evidence adduced is that accused and the accused alone are guilty of the offence. (***See C.K.Raveendra*n v. S*tate of Kerala (J*T 1999 (9) SC *408)*** and ***Jaswant Sing*h v. S*tate (Delhi Admn*) (AIR 1979 SC 190)**. Circumstantial evidence should not only be consistent with the guilt of the accused but should also be inconsistent with his innocence as held by the Apex Court in **Mangaleshwari v. State of Bihar (AIR 1954 SC 715).** It has been repeatedly held by the Supreme Court that the distinction between 'may be true' and 'must be true' is

long and divides vague conjectures from sure consideration and each link must be established by clear and unobjecting circumstances. In ***State of Kerala v. Ramachandran (1999 (3) KLT 512)***, Chief Justice Arijit Pasayat (as he then was) observed for the Bench as follows:

> It is settled principle of law that the circumstances relied upon by the prosecution must be fully established, and the chain of evidence furnished by those circumstances should be fully complete so as not to leave any reasonable ground for a conclusion consistent with the innocence of the accused. In a case of circumstantial evidence not only various links of evidence should clearly establish guilt of the accused, but also it must be such as to rule out a reasonable likelihood of the innocence of the accused."

The Apex Court in **Sharad v. State of Maharashtra (AIR 1984 SC 1622)** prescribed five principles for convicting an accused on the basis of circumstantial evidence which are as follows:

1. the circumstances from which the conclusion of guilt is to be drawn should be fully established, as distinguished from 'may be' established.

2. the facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty;

3. the circumstances should be of a conclusive nature.

4. they should exclude every possible hypothesis except the one to be proved; and

5. there must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused.

Such conclusive evidence is not forthcoming in this case and the sole evidence is the alleged recoveries which are suspicious and cannot be the sole basis of conviction. Prosecution failed

to connect the chain of circumstances to connect the crime to A3 and A4.

In the above circumstances, prosecution failed to prove the charges levelled against the appellants conclusively and in any event, they are entitled to get the benefit of reasonable doubt. Hence conviction and sentence passed against them are set aside and they are acquitted. They should be set free forthwith if their continued detention is not required in connection with any other case.

Appeals are allowed accordingly.

J.B.KOSHY, JUDGE

K.HEMA, JUDGE

prp

J.B.KOSHY & K.HEMA, JJ.

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7th November, 2007